defence, it is clear that the defendant was not telling the truth in his pleading.

It should be added here that in para 5 of the affidavit the defendant was correcting what he admitted was an error in the statement of defence. In *UMBC* v *Palm & Vegetables Oils (M) Sdn Bhd*,[2] the Federal Court had ruled at p 207 that '... any defect or omission in the statement of claim cannot be made good by affidavit evidence ...'. The same rule applies to statement of defence. See *Pernas Sime Darby Holdings Sdn Bhd* v *M Poovanandran*.[3] In the instant case, I made reference to the affidavit to show that the defence is not a bona fide defence. Since para 3(10) of the statement of defence cannot be made good by para 5 of the affidavit, the averment in para 3(10) of the defence remains. In other words, the defendant has made a false averment in that paragraph because it is clear from the quit rent receipts and assessment receipts exhibited to the plaintiff's affidavit affirmed on 16 December 1987 that the plaintiff has been paying the said rents from the year 1980. It is obvious that the defendant has no defence at all. In my opinion, the whole defence is a sham defence and the counterclaim has no merit whatsoever.

In the circumstances, the plaintiff is entitled to have final judgment for possession of the said property and for damages to be assessed. I accordingly allow the plaintiff's application for final judgment against the defendant for possession of the said property with costs. I also order that damages suffered by the plaintiff be assessed by the senior assistant registrar.

Application allowed.

Solicitors: *Reginald Vallipuram & Co*; *Vincent Lai & Co.*

Reported by *Kevin Mathews*

Kuppusamy v Nithanathan

HIGH COURT (PENANG) — CIVIL SUIT NO 25-117-85
EDGAR JOSEPH JR J
12 MARCH 1990

Road Traffic — Negligence — Collision — Liability disputed — Plaintiff unable to testify due to injuries

Tort — Negligence — Road accident — Quantum of general damages

Damages (Personal Injury or Death) — Severe brain damage — General damages — Quantum

The plaintiff, a motor cyclist, suffered severe head injuries in a collision with a bus. He claimed damages for negligence against the defendant. The plaintiff was unable to testify in court due to amnesia; his case rested solely on the evidence of the sketch plan, photographs and damage to the vehicles. Special damages were agreed on before the trial, leaving the court to assess general damages.

Held, finding the defendant 50% liable:

(1) The road from which the plaintiff was emerging was a major road while the road from which the defendant driver emerged was a side road. Both the plaintiff and the defendant were under a duty of care to be on the lookout for other road users. However, there was a hindrance to both their views.

(2) Having regard to the evidence, the probabilities are that the collision occurred when the defendant driver had traversed about half of the junction. There was no evidence that the defendant driver stopped or slowed down before he emerged from the side road into the main road as he did not testify. It would therefore be wrong to assume in the absence of evidence that he did stop or slow down.

(3) On a balance of probabilities, the collision could not have occurred but for want of care on the part of both the plaintiff rider and the defendant driver. Having found that both are to blame and there being no means of distinguishing between them, the blame should be cast equally on each.

(4) General damages for pain, suffering and loss of amenity in the sum of $110,000 were awarded. Loss of future earnings was agreed at $34,902, loss of past earnings at $23,100 and other specials at $1,530. Interest was awarded at 3% pa on special damages from the date of accident to date of trial, and at 6% pa on general damages for pain, suffering and loss of amenity from the date of service of the writ. The judgment debt was to attract interest at 8% pa from the date of judgment until payment. The plaintiff was also awarded costs.

Cases referred to

1 *Humphrey* v *Leigh* [1971] RTR 363 (refd)
2 *Hussein & Anor* v *Maiden* [1970] 1 MLJ 114 (refd)
3 *Lew Voon Kong & Anor* v *Mustaffa bin Kamis* [1978] 1 MLJ 217 (refd)
4 *Harding (An Infant)* v *Hinchcliffe* The Times, 8 April 1964 (refd)
5 *Williams* v *Fullerton* (1961) 105 SJ 280 (refd)
6 *The 'MacGregor'* [1943] AC 197 (refd)
7 *Brown & Anor* v *Thompson* [1968] 2 All ER 708 (refd)
8 *Lang* v *London Transport Executive* [1959] 3 All ER 609 (refd)
9 *Chong Ying Khoon* v *Lee Joo Kam & Anor* [1988] 1 CLJ 795 (refd)

10 *Pattana/l Sembadayan* v *Periasamy s/o Vellan* [1988] 1 CLJ 826 (refd)
11 *Tominam bte Tukimin* v *Toh Kai Chup* [1985] 2 MLJ 345 (refd)
12 *Lai Chi Kay & Ors* v *Lee Kuo Shin* [1981] 2 MLJ 167 (refd)
13 *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217 (refd)
14 *Liong Thoo* v *Sawiyah & Ors* [1982] 1 MLJ 286 (refd)
15 *Murtadza bin Mohamed Hassan* v *Chong Swee Pian* [1980] 1 MLJ 216 (folld)

Legislation referred to
Rules of the High Court 1980 O 42 r 12

Brijnandan Singh Bhar for the plaintiff.
Balachandran Mahesan for the defendant.

Cur Adv Vult

Edgar Joseph Jr J: This was a running down case involving a bus and a motor cyclist in broad daylight at a cross road junction.

There were no witnesses to the collision; indeed, neither the driver nor the rider was called to testify. The reason why the defendant driver was not called, according to his counsel, was because he was untraceable. As for the plaintiff rider, it was common ground that because of head injuries, he could be suffering from amnesia, and so was unable to recall the circumstances of the collision.

In the event, counsel for the plaintiff was compelled to rely, solely, upon the silent evidence of the sketch plan (with key) prepared by the police, the photographs taken by the police of the scene and damage to the vehicles soon after the collision, which evidence, incidentally, was agreed.

The case for the plaintiff was argued upon the basis that the plaintiff rider was proceeding northward along the main road when the defendant driver shot out from a a side road to his (the plaintiff's) right, in a westerly direction, in circumstances which made it impossible to avoid a collision. Accordingly, on the basis of *Humphrey* v *Leigh*,[1] it was argued that the cause of the collision was due entirely to the negligent driving of the defendant driver. Alternatively, it was submitted that if there was contributory negligence on the part of the plaintiff rider, since the damage to the vehicles and the sketch plan suggested that the bus might have traversed part of the junction, no more than 25% of the blame should be allocated against him.

On the other hand, counsel for the defendant stressed that the roads at the cross road junction were of equal status and so it would be wrong to hold that this was a collision between a plaintiff who was proceeding along a main road and a defendant who had driven out of a side road. In this context, counsel invited me to disregard the testimony of the investigating officer, who supported counsel for the plaintiff, so far as this particular issue was concerned.

For myself, upon the testimony of the investigating officer, who in my opinion was an independent witness and perfectly familiar with the scene, I am satisfied that the road along which the plaintiff was proceeding was indeed a major road while the road from which the defendant driver emerged was a side road. It was, however, common ground that there was no stop sign, or stop line, or go slow sign at or near the junction where the side road merged with the main road.

Nevertheless, I am satisfied that both the plaintiff and the defendant were each under a duty of care to be on the lookout for other road users. The plaintiff was riding a motor cycle, which of course was far more manoeuverable than a bus but the latter would, for obvious reasons, pose an even greater danger to other road users than the former. I do not overlook the fact that the investigating officer's evidence was that a road user in the position of the plaintiff rider could have seen the side road from which the bus emerged, at a distance of say 20 ft only, because of a hindrance to the view caused by the existence of a factory shown in the sketch and one of the photographs. It goes without saying that this factory would have also been a hindrance to the view so far as the defendant driver was concerned. It was not clearly established where the point of impact was or what the positions of the vehicles were when they collided but, having regard to evidence of the damage to the vehicles — the near side front door of the bus being slightly dented and the front wheel of the motor cycle being badly damaged — the position of the vehicles soon after the collision and the fragments of glass on the road, as appeared from the sketch plan, I am satisfied that the probabilities are that the collision had occurred when the defendant driver had traversed about half the junction. There is no evidence that the defendant driver stopped or even slowed down before he emerged from the side road into the main road as he undoubtedly should have. The best evidence as to this would have been his own testimony since this was a fact especially within his knowledge but, as I have said, he did not testify. It would therefore be wrong for me to assume, in the absence of evidence, that he did stop or slow down before he emerged from the side road into the main road.

For the reasons stated, I am satisfied on the balance of probabilities, that the collision could not have occurred but for want of care on the part of both the plaintiff rider and the defendant driver. In common with so many other road users, they appear to have thought that they owed no duty of care to other road users so long as they proceeded on their side of the road.

I must next apportion liability. The authorities in this area cannot be looked upon as precedents to be slavishly followed as they are but illustrations of the way in which the courts approach such a question. Nevertheless, I have considered several of them including *Hussein & Anor* v

Maiden,[2] *Lew Voon Kong & Anor* v *Mustaffa bin Kamis*,[3] *Harding (An infant)* v *Hinchcliffe*,[4] *Williams* v *Fullerton*,[5] *The 'MacGregor'*,[6] *Brown & Anor* v *Thompson*[7] and *Lang* v *London Transport Executive*.[8]

In all the circumstances, having found that both the defendant driver and the plaintiff rider are to blame and there being no means of distinguishing between them, I would cast the blame equally on each.

As regards quantum, the only dispute was as regards the appropriate sum to award for general damages for pain and suffering and loss of amenity.

Mr Gunasekeran, the consultant neurosurgeon, in his agreed report, had stated, and here I would quote him:

> In my opinion, this patient has sustained a diffuse irreversible brain injury which has left him with severe permanent disabilities. He is independent in so far as activities of daily living are concerned (eating, bathing, dressing) but unable because of his physical and mental disabilities to return to his former occupational level.
>
> The patient is severely demented, that is, there is a deterioration in the mental functions manifesting primarily in thought and memory and secondarily in feeling and conduct. The impaired emotional control leads to bursts of anger and inability to persist in any constructive behaviour. The patient is apathetic and has lost all his former interests and lacking the drive of instinctive life becomes incapable of effort. Difficulties with emotional control, insight, intellectual deficit, inability to persevere with tasks, hemiparesis, headache, giddiness and speech defect combine to make the patient ineffective at his work and unable to hold his previous job or pursue worthwhile activities.
>
> The smaller than normal brain stem and ventricular enlargement indicates a diffuse brain injury with degeneration of nerve fibres and loss of white brain matter. The brain injury is irreversible and this patient's disabilities are permanent.

On the basis of this report, counsel for the plaintiff contended for an award of $150,000 for general damages for pain and suffering and loss of amenity while counsel for the defendant contended for an award of $80,000.

My attention was directed to a wealth of authority, including *Chong Ying Khoon* v *Lee Joo Kam & Anor*,[9] *Pattan a/l Sembadayan* v *Periasamy s/o Vellan*,[10] *Tominam bte Tukimin* v *Toh Kai Chup*,[11] *Lai Chi Kay & Ors* v *Lee Kuo Shin*,[12] *Jamil bin Harun* v *Yang Kamsiah & Anor*[13] and *Liong Thoo* v *Sawiyah & Ors*.[14]

Doing the best I can, I would award the plaintiff $110,000 for general damages for pain and suffering and loss of amenity. General damages for loss of future earnings were agreed at $34,902, while special damages for past loss of earnings from date of accident to date of hearing were agreed at $23,100. Other specials were agreed at $1,530.

To summarize, therefore, on the basis of full liability, the plaintiff would have been entitled to:

General damages for pain and suffering and loss of amenity	$110,000
Agreed general damages for loss of future earnings	$ 34,902
Agreed special damages for loss of past earnings	$ 23,100
Other agreed special damages particularized in the statement of claim amounting to	$ 1,530
	$169,532

However, having regard to my finding that the plaintiff was 50% to blame for the collision, the damages aforesaid will have to be correspondingly reduced and I make an award accordingly. I would also award interest at the rate of 3% pa on the special damages from date of accident to date of trial and at the rate of 6% pa on the general damages for pain and suffering and loss of amenity from date of service of the writ. (See *Murtadza bin Mohamed Hassan* v *Chong Swee Pian*.[15]) The judgment debt will also attract interest at the rate of 8% pa from date of judgment until payment in accordance with O 42 r 12 of the Rules of the High Court 1980. The defendant must also pay the plaintiff's costs of the action.

Order accordingly.

Solicitors: *Brijnandan Singh Bhar & Co*; *Bala Mahesan & Co.*

Reported by *Azra Moiz*